so restricted, Petitioner's reason B appears on its face to be no reason for allowance of the writ in this case.

The tort of contributory infringement arises from abetting the tort of direct infringement. Whether the unpatented article or material is or is not one of common usage is not controlling where knowledge is shown.

C. The reason here, if the statement of fact with reference to the opinions of the patent profession be true, is wholly academic to the present case, since it is not shown that Respondent has imposed any restrictions upon licensees or that Respondent has profited from the sale of its asphalt emulsion rather than from its patent.

Respondent is shown to have granted one license without restriction and a patentee's right to sell without restriction a material adapted to carry out the method of a patent is not open to question.

The decisions of the Courts (cited by Petitioner in the appendix to its petition and brief) in which the *Dry Ice Case* has been considered, show no confusion, but rather a clear understanding of the rule thereof, drawn, on the one hand, in line with the *Motion Picture Case*, involving a restricted license, and on the other hand, in distinction from the *Talking Machine Case*, a case of ordinary contributory infringement.

D. In the present case the District Judge decided from the Bench that contributory infringement existed here. (Record, pp. 18-19.) The discussion of contributory infringement in the opinion of the District Judge is purely academic and is largely of the English rule predicated on statute.

The dissent in the Circuit Court of Appeals, which is no basis for granting a writ of *certiorari*, entirely overlooks

the lack of any restricted license and the deliberate and willful tortious acts of the Respondent in the present case, as well as the right of a patentee, affirmed by this Court in the *Talking Machine Case,* to prevent anyone with knowledge from (tortiously) abetting a direct infringement by the supply of an unpatented article or material to a direct infringer.

APPENDIX ON LAW OF CONTRIBUTORY INFRINGEMENT.

The cases cited by the Petitioner make it clear that the Courts find no difficulty in distinguishing cases of ordinary contributory infringement from the holding in the *Dry Ice Case,* and do not in any way indicate confusion in interpretation of the *Dry Ice Case.*

General Foods Corporation v. Seeman Bros., Inc., 60 Fed. (2d) 622. Completion of the Petitioner's quotation from the Court's opinion in this case makes it evident that the sale of "Certo", an unpatented product, for use in carrying out a patented process, was an ordinary case of contributory infringement obviously distinguishable from the *Dry Ice Case:*

> "In the present case, there are no restrictive notices, and, *even though Certo is fully open to the public,* still any one, who, without a license, practices the patented process, is an infringer. *It would seem clear, also, that any one who knowingly induces such an infringement is liable as a contributory infringer.*" (60 F. (2d) 622, 625.) (Italics ours.)

National Pigments & Chemical Co. v. Shreveport Chemical Co. (1 F. Supp. 417).

Again the Petitioner incompletely quotes from the opinion. Completion of Petitioner's quotation makes it evident

that the Court was in no way confused by the decision in the *Dry Ice Case* and readily distinguished ordinary contributory infringement:

> "In other words, plaintiff in that case [Dry Ice Case] did not stand upon and confine itself to the protection afforded by the patent, but *attempted to widen the scope of its monopoly by contract or notice* beyond that which is permitted by the patent laws (it charged nothing for the carton or package but sought to make its profit out of the sale of solid carbon dioxide). I find, therefore, no analogy between the two cases, but the present one is more nearly akin to that of *Leeds & Catlin v. Victor Talking Machine Co.*, 213 U. S. 323 and authorities therein cited." (1 F. Supp. 417, 421.) (Brackets ours.)

The Court further distinguished from the *Dry Ice Case* on the line which distinguishes the present case:

> "Unlike **Carbice Corporation of America v. American Patents Development Corporation**, 283 U. S. 27, commonly referred to in the briefs as the *'Dry Ice Case', the present plaintiff is not suing for contributory infringement based upon dealings by the defendants with the former's licensees.*" (1 F. Supp. 417, 421.) (Italics ours.)

Chas. H. Lilly Co. v. I. F. Laucks, Inc., 68 F. (2d) 175.

This case does not refer to the *Dry Ice Case* and does not conflict with that case or with the well-settled principles of contributory infringement.

This case is one of alleged contributory infringement in which the essential element of knowledge was not proved and in which knowledge could not be presumed, since the

material sold was a standard article of commerce rather than an article finding use only in infringement.

The statement from the opinion quoted by Petitioner follows the finding of failure to prove knowledge and merely disposes of the contention that the soya bean flour was a product so unique in character as to warrant the presumption of knowledge.

The *Alemite Cases* [**Alemite Corporation v. G. S. Rogers et al.**, 5 F. Supp. 940; **Bassick Manufacturing Co. v. Adams Grease Gun Corp.**, 52 F. (2d) 36] are consistent in holding contributory infringement where the elements thereof appeared.

It is self-evident that the restraining of contributory infringement is incident to the monopoly of a patent, in distinction from expansion of the monopoly by restriction imposed by contract or notice upon a licensee.

Restriction on the sale of unpatented articles with intent (knowledge) that they be used in violation of a patent is a restriction on infringement of the patent monopoly. It is within and a part of the monopoly and no more an expansion of the monopoly than is restriction upon direct infringement.

Gillette Safety Razor Co. v. Standard Safety Razor Corporation, 64 F. (2d) 6.

In this case the Court found no contributory infringement in the sale of razor blades because it appeared that the blade was sold for replacement of an expendable element of a patented combination.

In this case the Circuit Court of Appeals, Second Circuit, as quoted by Petitioner, found no difficulty in recognizing, as the Courts generally have, that the *Dry Ice Case* "does not change the rule of liability for contributory infringement."

Gillette Safety Razor Co. v. Standard Safety Razor Corporation, 2 F. Supp. 64, certainly fails to indicate any confusion with reference to contributory infringement. The Connecticut Court, on the evidence before it, simply found present the elements of contributory infringement. The fact that the Court of Appeals reversed does not indicate confusion as to doctrine, but rather merely a disagreement on the legal effect of the facts.

The above decisions cited by Petitioner wholly fail to show conflicting decisions on similar facts—in fact to the contrary. The citations show entirely consistent interpretations of the *Dry Ice Case* and consistent conclusions therefrom and with respect to the doctrine of contributory infringement.

The citations and the *Dry Ice Case,* far from throwing any doubt upon the doctrine of contributory infringement, affirm it as well established under the United States Patent system.

CONCLUSION.

The present case is one which presents all the elements of an ordinary case of contributory infringement of a patent.

The present case presents no question of law not clearly established by decisions of this Court which have been consistently followed by the Lower Courts and were followed by this Circuit Court of Appeals in deciding the present case.

Wherefore Respondent respectfully represents that the writ of *certiorari* prayed for by Petitioner should be denied.

Respectfully submitted,

GEORGE J. HARDING,
FRANK S. BUSSER,
Counsel for Respondent.